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STATE OF MICHIGAN

IN THE SUPREME COURT

IN ~~THE MATTER OF~~: Re B.M.B., G.P-B.,

~~BRYNN MARIAM BANKS and~~
~~GREGORY PETOSKEY-BANKS~~, OK

Minors,

Supreme Court
No.

FAMILY INDEPENDENCE AGENCY,

Court of Appeals
No. 252617 Opn 9/30/04

Petitioner-Appellant

v

Lower Court
No. ~~B~~ 03-225 N
St. Clair
E. Brown

LAFRAYE BANKS,

Respondent-Appellee,

27292 TIMOTHY K. MORRIS (P-40584)
Attorney for Petitioner-Appellant

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Attorney for Respondent-Appellee

11/23 SAMANTHA A. LORD (P-58604)
26546 Guardian Ad Litem

PETITIONER-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

******ORAL ARGUMENT REQUESTED******

RELIEF REQUESTED

NOTICE OF HEARING

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BASIS OF JURISDICTION

This Court has jurisdiction to hear Petitioner's application for leave to appeal pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS' REVERSAL OF THE TRIAL COURT'S DECISION TERMINATING RESPONDENT-APPELLEE'S PARENTAL RIGHTS WAS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE IF ALLOWED TO STAND?

Petitioner-Appellant answers "Yes."

The Respondent-Appellee would answer "No."

This question was not presented to the Trial Court for review.

II. WHETHER THE TRIAL COURT'S CONCLUSION THAT RESPONDENT-APPELLEE'S ACTIONS WERE INTENTIONAL AND REPRESENTED CLEAR AND CONVINCING EVIDENCE OF LIKELY FUTURE HARM TO THE CHILDREN WAS SUPPORTED BY THE RECORD?

Petitioner-Appellant answers "Yes."

The Respondent-Appellee would answer "No."

The Trial Court answered "Yes."

III. WHETHER THE TRIAL COURT PROPERLY FOUND CLEAR AND CONVINCING EVIDENCE TO TERMINATE WHERE THERE WAS NO EVIDENCE THAT A MENTAL CONDITION CAUSED RESPONDENT-APPELLEE'S ACTIONS?

Petitioner-Appellant answers "Yes."

The Respondent-Appellee would answer "No."

The Trial Court answered "Yes."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Trial seeking jurisdiction of Brynn Marie Banks (d.o.b. 10/07/02), and Gregory Petoskey Banks (d.o.b. 04/26/94) was conducted on August 27th and September 3, 2003. Respondent-Appellee's parental rights were terminated by the court on October 30, 2003. The Family Independence Agency filed a mandatory petition requesting the court take jurisdiction of the minor children, and, consistent with the Binsfeld legislation, terminate Respondent-Appellee's parental rights. The petition was necessitated by Respondent-Appellee throwing her seven month old baby out a second story bathroom window.

As a result of Respondent-Appellee's actions the baby suffered multiple contusions and abrasions, collapsed lungs on both sides, and a fracture of the right femur. (T Volume I of II pp 51-52). The treating physician testified that "...certainly there was a risk that she could have expired. She could have died". (T Volume II of II p 63). While there was testimony regarding Respondent-Appellee's depression, the record is absent of any expert or lay opinion testimony indicating that mother's actions resulted from mental illness, or that mother somehow was unaware of the seriousness of her actions.

The testimony and photographic evidence introduced at trial established that fourteen feet directly below the bathroom window there was an area of soft dirt. Beyond that area the grass begins. All parties agree the baby landed "in the grass". Respondent-Appellee's mother, Beatrice Banks, testified that shortly after the baby went out the window Respondent-Appellee came downstairs saying the baby was out "on the grass" (T Volume II of II p 107-108). The treating physician testified that he was informed the patient landed on a "grassy area"

(T Volume I of II p 50). Respondent-Appellee testified the baby was on the grass (T Volume II of II p 143).

The testimony and photographic evidence presented at trial clearly indicated the "grass" beneath this window began nearly three feet from the building (T Volume I of II p 26, 35). Further, testimony at trial indicated that there were no footprints or signs of any disturbance in the soft dirt area fourteen feet directly beneath the bathroom window in question (T Volume I of II 25-26). Testimony further indicated that had the baby fallen directly down as argued by Respondent-Appellee, the child would have fallen onto a jagged topped planter and yard decorations (T Volume I of II 26).

Respondent-Appellee testified that at some point and time just prior to Brynn being thrown out the second floor bathroom window, she had used the commode, *washed her hands in the bathroom sink, and nothing impeded or blocked her from washing her hands.* (Emphasis added). (T Volume II of II p 143, and 149).

On Wednesday, September 3, 2003, Respondent-Appellant testified:

> I had her in my lap and then I got up off the toilet and I used–washed my hands. (T. Volume II of II, p 142).
>
> Question (from attorney for Petitioner): Then you washed your hands and immediately picked up the baby and walked to the window; is that correct?
>
> Answer (by Respondent-Appellant): Yes.
>
> Question: Was there anything that blocked you or impeded you from washing your hands?
>
> Answer: No. (T. Volume II of II, p 143).

Question: Okay. And you've heard her testimony and Officer Pike's testimony that, before she went to church the next day, he was allowed to come in to take some photographs of the interior of the bathroom; correct?

Answer: Yes.

Question: I'm going to show you what's been marked as –well, what's been admitted as Exhibits 5 and 6. Does that show a set of vertical blinds across the sink?

Answer: Yes.

Question: Okay. And is that the same sink in the bathroom that you've testified you washed your hands in right after going to the bathroom?

Answer: Yes.

Question: Okay. So is it fair to say that you removed those blinds at some time?

Answer: No, I didn't.

Question: Let's back up a little bit. You testified that there was nothing impeding your ability to wash your hands. Do you see those blinds across the center of that bowl?

Answer: Yes.

Question: And after–And you heard Officer Pike testify that he took photos of the bathroom the way he found it; correct?

Answer: Right. (T. Volume II of II, pp145-146).

Question: Ma'am. You testified that you used the sink and there was nothing across the sink to impede you from using–is that correct?...Those blinds were not on that sink; correct?

Answer: Correct.

Question: But you were the only adult in that bathroom;

correct?... Is that true?

Answer: Yes. (T. Volume II of II, p 149).

On October 15, 2003 the Juvenile Court Attorney Referee found sufficient evidence to make the children temporary wards of the court, but refused to terminate Respondent-Appellee's parental rights. Petitioner-Appellant requested review of the referee's recommendation. The trial court, upon review of the record, set aside the order and entered an order terminating parental rights. Respondent-Appellee appealed to the Court of Appeals, submitting an original and supplemental brief in support of that claim. The Court of Appeals reversed the trial court's decision, reinstating the referee's opinion.

THE BASIS FOR THIS APPLICATION

Petitioner now brings this application for leave to appeal to the Honorable Court on the following grounds:

First, the Court of Appeals' panel substituted its judgement for that of the trial court and failed to consider the intentional nature of Respondent-Appellee's actions. Those actions led to the severe injuries suffered by Respondent-Appellee's seven month old baby. The Appellate Court's failure to consider the severe nature of this act, and the trial court's conclusion that this was an intentional act resulted in a clearly erroneous decision which will cause material injustice. MCR 7.302 (B)(5).

Second, the Court of Appeals' decision is silent on the trial court's conclusion that Respondent-Appellee intentionally injured her baby, and as such provided clear and convincing evidence of the likelihood that the children would be injured if returned to Respondent-Appellee. The facts and evidence presented at trial indicated an intentional act. The trial court so found. As such the trial court found clear and convincing evidence that the there was a reasonable likelihood the children would be at risk of harm if returned to Respondent-Appellant. The Court of Appeals' decision conflicts with other decisions of the Court of Appeals allowing the finder of fact to infer intentional acts. MCR 7.302(B)(5).

Third, The Court of Appeals' decision appears to be based upon an improper expansion of the record regarding Respondent-Appellant's mental condition. Such consideration conflicts with other decisions of the Court of Appeals. MCR 7.302(B)(5).

I.

THE TRIAL COURT'S DECISION TO TERMINATE RESPONDENT'S PARENTAL RIGHTS WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND THE COURT OF APPEALS' REVERSAL OF THAT DECISION IS CLEARLY ERRONEOUS.

Once a trial court found clear and convincing evidence to support any one of the statutory grounds to terminate parental rights, and that it was in the child's best interest to do so, the court was required to terminate Respondent-Appellee's parental rights. MCR 5.974(A)(2); M.C.L. 712A.19b(5). The trial court's decision to terminate Respondent-Appellee's parental rights was based on clear and convincing evidence, and in the child's best interest. The subsequent reversal by The Court of Appeals is clearly erroneous and will cause material injustice.

Findings of fact with regard to termination of parental rights are reviewed under the clearly erroneous standard. *In re McIntyre,* 192 Mich App 47, 50; 480 NW2d 293 (1991); citing *Matter of Miller,* 182 Mich App 70; 451 NW2d 576 (1990). Because the decision whether to terminate parental rights is within the court's discretion, and the best interest of the child are to be considered, that decision will not be reversed absent an abuse of discretion. *Id.* at 52. "A decision must strike [the reviewing court] as more than just maybe or probably wrong." *In re Trejo,* 462 Mich 341, 356; 613 NW2d 427 (2000).

The petitioner requesting termination of parental rights bears the burden of proving at least one ground for termination. *In re Trejo, supra,* at 350. If grounds for termination are

found, "the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interest." MCL § 712A.19b(5). Subsection (5) unambiguously provides that once the petitioner proves by clear and convincing evidence one ground for termination enumerated by subsection (3), the court shall order termination of the parental rights. *In re Trejo* 462 Mich at 352. In determining whether to terminate parental rights to a child, the court may consider the original circumstances which prompted placing the child in temporary custody and all subsequent events, provided they are part of the record. *In re LaFlure*, 48 Mich App 377, 390-391; 210 NW2d 482 (1973). Because the determination to terminate Respondent's parental rights was supported by clear and convincing evidence, the decision of the trial court should be affirmed.

In the case at bar, testimony presented at the termination trial indicated Respondent-Appellee's actions were so outrageous and so severe that nothing short of termination of parental rights would protect these children. At only seven months of age, Brynn Banks was thrown from a second story bathroom window by Respondent-Appellee. That second story window was some fourteen feet off the ground. Little Brynn landed nearly three feet from the building. It defies common sense and the laws of physics to argue that this was some type of "accident". In it's opinion the lower court indicated:

> ...this court in review of the testimony is firmly convinced that the injuries to this child were not as a result of neglect but more as a result of an intentional act on the part of the parent to seriously injure or kill this child. As a result, this court is left with a firm conviction that the child has suffered a physical injury and that the parent's act caused that physical injury...given the severity of the

> conduct of the respondent toward the minor child, Brynn, a sibling of Gregory, this court is of the opinion that Gregory would also be at risk of harm in the presence and care of the respondent.

(Order of the trial court dated October 30, 2003 [hereinafter "Order"] attached as Exhibit A)

Once the court found clear and convincing evidence to order termination of parental rights, the court addressed the best interest of the children, "...given the severity of the conduct of the respondent toward this minor child the court is convinced that it would not be in either child's best interest not to terminate mother's parental rights." (See Order, Exhibit A). Given the severity of Respondent-Appellee's actions it was clearly in the children's best interest to terminate parental rights.

Unlike the trial court, the Court of Appeals, for unexplained reasons, failed to consider the severity of Respondent-Appellee's intentional act that caused little Brynn's life threatening injuries. The Court's failure to consider the serious nature of Brynn's life threatening injuries, the fact that Respondent-Appellee's actions caused those injuries, and the Court's affirmative failure to address the trial court's decision that Respondent-Appellee's actions were "intentional" is contrary to the legislative intent of recent child protection laws.

The Family Independence Agency *must* file a petition seeking Family Division jurisdiction of the child under MCL 712A.2 (b); MSA 27.3178 (598.2)(b) if any of the following circumstances exist:

> (a) The Family Independence Agency determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling and the abuse included one or more of the following:

(i) abandonment of a young child;

(ii) criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate;

(iii) battering, torture, or other severe physical abuse;

(iv) loss *or serious impairment* of an organ or limb;

(v) *life threatening injury;* or

(vi) murder *or attempted murder.*

MCL 722.638(1)(a); MSA 25.248(18)(1)(a).

In a mandatory petition filed under MCL 722.638(1)(a) above, if a parent is a suspected perpetrator of the abuse the Family Independence Agency must include in the mandatory petition a request for termination of parental rights. MCL 722.638 (2); MSA 25.248(18)(2). The Court of Appeals has validated these types of mandatory termination petitions, commonly referred to as The Binsfeld Amendments, and their underlying public policy: "A straightforward reading of the statutory language clearly reveals that the Legislature's goal was the protection of children from unreasonable risks of harm. The statute therefore served a compelling state interest." *In re* AH 245 Mich App 77, 83-84; 627 NW 2d 33 (2001). The Court went on to state: "Therefore, while the statute does in effect create a separate class of parents, we do not conclude that it violates equal protection." *In re* AH, *supra* at 85.

The instant case came to trial based upon a mandatory petition for termination of parental rights pursuant to MCL 722.638(1)(a) and (2). Subsequently, based upon the record

at trial, the trial court terminated parental rights pursuant to MCL 712A.19b(3)(b)(i), which provides:

> The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the child or a sibling of the child has suffered physical injury or physical or sexual abuse under either of the following circumstances:
>
> (i) the parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

The emergency room doctor who treated little Brynn indicated "her injuries consisted of multiple contusions and abrasions. The worst of her injuries included collapsed lungs on both sides and she had a right femur fracture, which is the large bone of the thigh of the leg, on the right hand side. And I believe that was it, which is enough." (T. Volume I of II, p. 51-52). The doctor went on to state "...there was a risk that she could have expired. She could have died." (T. Volume I of II, p. 63). The doctor's testimony provided clear and convincing evidence that this infant had suffered a "physical injury" as required by statute. It was also established by clear and convincing evidence that the Respondent-Appellee's act caused the physical injury.

The statute does not require the act be intentional, but the trial court found Respondent-Appellee's act was intentional, and as such, provided clear and convincing evidence that there was a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home. In other words, the intentional nature of this outrageous act indicates a propensity to repeat such abusive behavior. The trial court's

decision was consistent with the facts adduced at trial, the legislative intent of Michigan's Child Protection statutes, and MCL 712b(3)(b)(i) specifically. The Court of Appeals' reversal of that ruling is clearly erroneous and will cause material injustice by placing these children at risk if allowed to stand.

II

THE TRIAL COURT'S CONCLUSION THAT RESPONDENT-APPELLEE'S ACTIONS WERE INTENTIONAL AND REPRESENTED CLEAR AND CONVINCING EVIDENCE OF LIKELY FUTURE HARM TO THE CHILDREN WAS SUPPORTED BY THE RECORD.

In its October 30, 2003 Opinion and Decision the trial court stated:

> ...this Court in review of the testimony is firmly convinced that the injuries to this child were not as a result of neglect but more as a result of an intentional act on the part of the parent to seriously injure or kill this child. As a result, this Court is left with a firm conviction that the child has suffered a physical injury and that the parent's act caused that physical injury and that because the parent intentionally tried to seriously injure or kill Brynn Banks the Court is left with the firm belief that there is a reasonable likelihood that the child will suffer injury or abuse in the future if left with the respondent mother.

In reversing the trial court's decision to terminate parental rights, the Court of Appeals stated, "...the trial court's further conclusions that respondent intentionally threw her child out the window for a reason other than mental illness and, thus would likely harm the child again in the future are not supported by *clear and convincing* evidence in the record." The law does not require the trial court to make a finding that abuse occurred "for a reason other than mental illness". A petition need not enumerate every theory or argument in support of Family Division jurisdiction. *In re Arntz,* 125 Mich App 634, 639; 336 NW2d 848 (1983), Reversed on other grounds 418 Mich 941; 344 NW2d (1984). Nor must the petition disprove every possible innocent explanation for an alleged injury. *In re Martin,* 167 Mich App 715, 723-724;423 NW2d 327 (1988). The Court of Appeals' conclusion herein is inconsistent with previous Court of Appeals' rulings and evidence admitted at trial.

When dealing with the question of what constitutes an intentional act, or the similar abstract concept of malice, finders of fact are free to infer intentional acts, intent, or malice based upon the actions of a party and the resulting injury or damage. In *People v. Lange* 251 Mich App 247; 650 NW2d 691 (2002), Defendant appealed his conviction for second-degree murder arguing among other things that the prosecution had failed to prove he had acted with malice. The Court of Appeals disagreed and stated:

> ...there is no question that the jury could have found beyond a reasonable doubt that the victim's death was caused by defendant when he intentionally hit the victim in the head with a glass mug. Further, because of the degree of force needed to cause the victim's injuries, the jury could have reasonably inferred that defendant acted with malice.

Lange, supra at *251-252; People v Djordjevic,* 230 Mich App 459, 462; 584 NW2d 610 (1998).

Much like the Court's reasoning in *Lange, supra*, the trial court in the instant case relied upon the facts surrounding Respondent-Appellee's actions and Brynn's injuries to conclude this was an intentional act:

> Testimony at the trial established that the respondent and the baby were in the bathroom on the second floor of the grandmother's home and that the child upon falling from the second story window landed approximately twenty-fine (29) inches away from the building and thus did not fall directly straight down from the window. The contention from the petitioner is that this was evidence that the child was propelled through the window in order to land that distance away from a direct straight fall. The evidence further indicated that the respondent testified that she had used the bathroom and washed her hands in the sink, picked the child up off the floor, and approached the window to look at someone who was outside that window. And at that point the child fell through the window. The physical evidence at the scene established that the venetian blinds that had covered the window had been removed and placed across the bowl of the sink and that there was a screw driver on the floor near the toilet and that the screen had not been cut but rather the rubber gasket material that held the screen in place in the frame had been pried out and removed, sufficiently, to create a large enough hole for the child

to go through.

> The respondent testified that the venetian blinds ended up across the bowl of the sink through some means she was not sure of but believed that the wind may have blown it there. The physical evidence established that this was quite some distance from the window that the blinds were in the up position as they lay across the sink and thus not subject to wind such as they would have been had they been fully down and that they had been placed laterally across the sink bowl that the respondent had testified that she herself had used in order to wash her hands after using the toilet. In all this evidence, it is clear and convincing to this Court that the respondent in this case intentionally removed the venetian blinds, pried the gasket out of the screen, created a hole and threw her child out the window.

See Order, Exhibit A). Because the record presented clear and convincing evidence this was an intentional act, the Court relying on that record made the logical conclusion that the children would remain at risk if returned to Respondent-Appellee:

> ...this court in review of the testimony is firmly convinced that the injuries to this child were not as a result of neglect but more as a result of an intentional act on the part of the parent to seriously injure or kill this child. As a result, this court is left with a firm conviction that the child has suffered a physical injury and that the parent's act caused that physical injury...given the severity of the conduct of the respondent toward the minor child, Brynn, a sibling of Gregory, this court is of the opinion that Gregory would also be at risk of harm in the presence and care of the respondent.

(See Order, Exhibit A).

The trial court's well reasoned decision was confined to the facts on the record, and, contrary to the Court of Appeals' decision, supported by clear and convincing evidence. The Court of Appeals' decision conflicts with the decisions cited above in violation of MCR 7.302 (B)(5).

III

THE TRIAL COURT PROPERLY FOUND CLEAR AND CONVINCING EVIDENCE TO TERMINATE WHERE THERE WAS NO EVIDENCE THAT A MENTAL CONDITION CAUSED RESPONDENT-APPELLEE'S ACTIONS.

Appeal came to the lower court based upon Appellee's original brief on appeal dated February 20, 2004. A supplemental brief dated June 16, 2004 was filed below by substitute counsel. The original brief argued the trial court's decision to terminate should be reversed "since there was not testimony that Ms. Banks mental illness was not treated effectively it is not clear and convincing that there was a reasonable likelihood to conclude that either child would suffer injury or abuse in the future" (Respondent-Appellee's original brief on appeal, p. 11). The original brief included an additional allegation of ineffective assistance of counsel. The supplemental brief also presented two issues. The first issue dealt with "new evidence", the second issue was simply an expansion of the first issue presented in the original brief.

It would appear the Court of Appeals relied upon the original brief when it reversed the termination of Respondent-Appellee's parental rights. This conclusion is based upon the Court's statement that, "Having concluded that the trial court erred in ordering termination of respondent's parental rights, we find it unnecessary to reach respondent's claim of ineffective assistance of counsel." (Court of Appeals' opinion [hereinafter "Opinion"] attached as Exhibit B). Because the ineffective assistance of counsel claim was presented only in the original brief, and the Court did not even address the additional issue presented in Respondent-Appellee's Supplemental Brief, it seems clear the Supplemental brief was irrelevant or at the most periphial

to the Court's decision.

The Court's reasoning that "...the trial court's conclusions were not based on clear and convincing evidence that the injury was unrelated to respondent's mental illness. Rather they were based on a perceived *absence* of evidence relating to this issue." (emphasis added by the Court) is obviously based upon an inappropriate expansion of the record, and therefore conflicts with established precedent.

As stated above, the Court of Appeals concluded the trial court relied upon an "absence of evidence" when it found there was a reasonable likelihood the children would suffer injury or abuse in the foreseeable future if placed in the parent's home. To the contrary, and unlike the Appellate forum below, the trial court properly confined it's consideration to the trial record. Both Respondent-Appellee's original and supplemental briefs contained references to, and actual attachments of, a supplemental police report and a letter from a psychiatrist. The attached documents were never entered into the record. The preparers of these documents never testified at trial. In fact, these documents were not even written until well after the trial in this matter had concluded. Petitioner-Appellant's response to each brief included an argument against the consideration of such material pursuant to *People v Spruytte,* 48 Mich App 135, 210 NW2d 155 (1973).

In *Spruytte, supra,* as in the case at bar, Appellee sought to expand the record in the Court of Appeals by including "new evidence". The Court rejected such an attempt stating: "This is an appellate court which tries cases on a record made and not on after the fact affidavits and 'exhibits' so-called." *Spruytte, supra* at 138. In *People v. Linzey,* 112 Mich

App 374; 315 NW2d 550 (1981), Appellant sought reversal of a criminal conviction based in part upon an attempted expansion of the record. Because the affidavits containing allegations that failure of Department of Corrections to provide psychiatric treatment in conformity with statute mandated reversal of his conviction were not part of the official trial record, the issue was not reviewable by the Court of Appeals. *Linzey, supra,* at 377.

In *People v Lange, supra,* Appellant sought reversal of his second-degree murder conviction. Appellant argued because a forensic pathologist testified that it was possible the victim's death could have been caused by asphyxiation from accumulated secretions in the victim's airway, which would only have occurred because of gross medical negligence, the prosecution failed to establish that Appellee caused the victim's death. The Court rejected this argument because defendant neither raised this issue below nor presented any evidence at trial to substantiate a claim of gross medical negligence. The Court stated, "...a defendant may not present a new theory on appeal after being unsuccessful on the theory presented at trial. See *Ficano v Lemons,* 133 Mich App 268, 275; 351 NW2d 198 (1983), and *Thoms v Diamond,* 131 Mich App 108, 117; 346 NW2d 69 (1983);. See also *People v Flenon,* 42 Mich App 457, 460; 202 NW2d 471 (1972)". *Lange, supra,* at 250-251, footnote 2.

In the case at bar, there was no testimony or exhibit indicating Respondent-Appellee's actions were the result of mental illness, or that she failed to understand the seriousness of her actions. The only "evidence" was the after the fact "exhibits so-called". *Spruytte, supra,* at 138. Because there is no evidence on the record indicating Respondent-Appellee's actions were the result of mental illness, and because neither of Respondent-Appellee's appellate briefs

cited a single case in support of that position, and because the Court failed to state it was not relying on the additional information, the Court of Appeals must have relied upon Respondent-Appellee's expansion of the record through argument and attachments. Such reliance conflicts with the well established case law cited above.

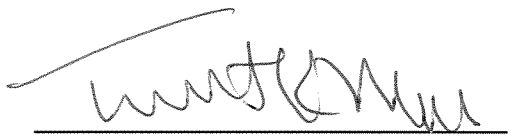
There is no doubt that Respondent-Appellee was suffering from depression and some emotional trauma prior to causing Brynn's injuries. The physician who treated her immediately after this incident indicated she had major depression with psychotic features. (Volume I of II p. 60). However, as the trial court stated: "There was no testimony at the trial that the actions of the respondent in throwing her child out the window of the second story of this building was a direct correlation or result of some mental illness." (See Order, P. 3, Exhibit A). The trial court's findings are consistent with the record and even consistent with both the record and Respondent-Appellee's own claim set forth in her supplemental brief..

Respondent-Appellee's June 16, 2004 Supplemental Brief on Appeal indicates Respondent-Appellee "never claimed she was possessed or was hearing voices telling her to hurt her child or throw her out the window. *Her confused mental state did not involve the child in anyway (*emphasis added). If the trial court found clear and convincing evidence that this infant received life threatening injuries due to Respondent-Appellee's intentional act, and there was no testimony that this intentional act was the result of or caused by mental illness, and Respondent-Appellee even agrees that her "confused mental state did not involve the child in anyway", no amount of mental health treatment could abate the future risk of harm to these children.

RELIEF REQUESTED

WHEREFORE, for all the foregoing reasons, Petitioner-Appellant respectfully requests this Honorable Court to uphold the trial court's decision terminating parental rights.

Respectfully submitted,



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